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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re M.H., a Person Coming Under the Juvenile Court Law.	
MICHAEL H., Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; ALAMEDA COUNTY SOCIAL SERVICES AGENCY ET AL., Real Party in Interest.	A125396 (Alameda County Super. Ct. No. J180858)

INTRODUCTION

M.H. has had a rough start in life. Born addicted to drugs, she has spent more than five of her not-yet nine years in various foster homes. She is now placed in the home of a cousin who wants to adopt her. M.H. reports being happy there and is in favor of the adoption. She has consistently asserted, since she was six years old, that she does not want to return to her parents' home. Nevertheless, her father—who initially requested that she be placed in the cousin's home—is attempting to have her moved once again, to a different cousin's home, based on rumors he has heard about domestic violence in the

home where M.H. lives, and based on his own suspicions about drug dealing there in light of what he has observed while driving past it late at night as a bus driver.

On July 2, 2009, at a status review under Welfare and Institutions Code section 366.3,[1] petitioner Michael H. (Father) requested a contested hearing so he could challenge the report and recommendations of the child welfare worker regarding the suitability and appropriateness of M.H.'s placement. The court set a hearing under section 366.26 (.26 hearing) for October 27, 2009, stating that Father's contested issues could be addressed at that hearing. Father claims his statutory and due process rights were violated by the court's refusal to set a contested hearing separate from the .26 hearing.

The question is, must the resolution of this little girl's fate be delayed even further based on her father's demand for a contested hearing on the "appropriateness" of her placement at a post-permanency review?

BACKGROUND

This is M.H.'s second trip through the California dependency system, and to put the matter in full context, we review the history of both petitions.

Born November 5, 2000, M.H. was the product of her mother's 25th pregnancy. A few days after birth, both she and her mother tested positive for cocaine and methadone, and M.H. was suffering from withdrawal symptoms. Alameda County Social Services Agency (Agency) filed a petition under section 300, subdivision (b). After spending more than a month in the hospital, M.H. was placed in foster care and was later adjudged a dependent of the court due to her mother's substance abuse and her father's failure to protect M.H. from its effects.

M.H.'s parents were not married, but they had been in a sustained relationship for five years and had two older children. Father knew about the mother's methadone use but denied knowing that she had been using cocaine during her pregnancy. Father had

[1] Statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

worked as a bus driver for AC Transit for 26 years and denied using illegal drugs. Part of his problem, at least as the Agency viewed it, was that he could not seem to bring himself to separate from M.H.'s mother, and therefore could not protect M.H. from the effects of the mother's drug use.

Despite Father's steady employment, by early 2001 the family had become homeless. A separate section 300 petition was filed for M.H.'s two older siblings. When Father learned they were going to be removed from the parents' custody, he absconded from the courthouse with them. Those children were not located again until April 2001, when they were found sleeping in a car while their mother was shoplifting from a grocery store. They, too, were then placed in foster care.

As the extent of the mother's drug addiction came into sharper focus,[2] it became clear that Father was the primary emotional support for the children. Reunification services for both parents were terminated in January 2002, as they maintained only transient living arrangements.

The Agency sought to terminate parental rights to all three children in May 2002, with the recommendation that all three be adopted. However, prior to the .26 hearing, Father filed a petition under section 388, claiming he had obtained safe and stable housing for the children and had separated from their mother. The two older siblings were returned to Father's home on March 26, 2003.

M.H. remained in the same foster home where she had resided most of her life, with a foster mother who wanted to adopt her. However, Father began to demonstrate greater parenting efforts and effectiveness, the father-daughter bond grew, and in late May 2003, M.H., too, was returned to Father's home. The court terminated jurisdiction

[2] The mother had been using heroin or methadone for 18 years, and admitted using cocaine during her pregnancy. M.H.'s older brother had also tested positive for methadone at birth and had to be hospitalized for three months.

and awarded physical custody to Father in August 2004. As far as we can ascertain from the record, M.H. continued to live with Father and her siblings[3] until early 2007.

On January 3, 2007, M.H. was temporarily removed from Father's home because she claimed her sister had pulled out a patch of her hair. At that time, her mother was again living with the family. M.H. told the social worker that she was routinely abused by her older sister, that her mother was "mean" to her, and that she was afraid of her mother and sister and did not feel safe at home. Her older sister told M.H. they were not really sisters, apparently because their mother claimed M.H. was not her daughter and had been switched at birth with her real baby.

A petition under section 300, subdivision (b), was filed January 5, 2007, alleging sibling abuse and failure by the parents to protect M.H. Father persistently denied the abuse and called M.H. a "liar," claiming she had fallen off a slide. M.H. was not detained and was released to Father on January 8, 2007.

Amended petitions filed January 23 and February 7, 2007 alleged further sibling abuse in that M.H.'s older brother hit her in the eyebrow with a ladder and scratched her neck, and her older sister choked her and hit her in the mouth, leaving a bruised lip. Father considered the incidents "classic sibling rivalry." The school principal reported, however, that M.H. also had recently exhibited aggressive behavior toward other students.

A detention order was issued February 8, 2007. M.H. was placed in a foster home, where she felt "safe, secure, comfortable and . . .very happy," and where she hoped to continue living. She bonded with her foster parents, and they considered guardianship or adoption.

[3] Despite Father's claim that he was separated from the mother, another child was born to the couple on May 18, 2003, who again tested positive for drug exposure. The dependency investigator concluded that the three older children, however, had not been exposed to the mother in the preceding six months.

While in foster care, M.H. consistently reported that she liked to see Father but not her mother or older siblings. She was adamant that she did not want to return to Father's home. Father's visitation was spotty.

On October 30, 2007, M.H. was moved to a different foster home based on allegations of a personal rights violation of another foster child in the earlier placement. By that time M.H. had been diagnosed with post-traumatic stress disorder.

After numerous continuances, M.H. was declared a dependent of the court on January 14, 2008, in a hearing combined with the six-month review. [4]

On August 8, 2008, at a combined 12-month and 18-month review, the court terminated reunification services to Father based on his "minimal" progress toward reunification. A .26 hearing was not scheduled because neither adoption nor guardianship appeared imminent. The court established a permanent plan of long-term placement with the foster mother, with the specific goal being guardianship.

M.H. and her foster mother liked each other but had not established "a very strong emotional connection." On September 16, 2008, M.H. was placed in the home of I.M., her paternal cousin (Father's niece), on an emergency basis (§ 361.45), because the foster mother could no longer handle M.H.'s behavioral issues. The placement with I.M. was made at Father's request and was subsequently approved by the court.

M.H. "flourished" in I.M.'s home and her behavior improved. On January 15, 2009, at a post-permanency six-month review (§366.3), the court again declined to set a .26 hearing. I.M. was considering adoption but was not yet ready to make that commitment. The permanent plan was finalized for M.H. to continue in a permanent living arrangement with I.M. Another status review was set for July 2, 2009.

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[4] On January 14, 2008, the court also ruled that M.H.'s mother need not be provided with reunification services. In September 2007, the mother had been arrested for shoplifting, and her three other children were declared dependents and placed with Father. The mother was again arrested for petty theft in December 2007 and remained in jail until late June 2008. She reportedly gave birth to yet another child sometime in June, for whom Father was caring.

By the time of the July 2 hearing, I.M. had made a definite decision that she wanted to adopt M.H., and M.H. agreed with that plan. M.H. was "happy" in I.M.'s home and had found there "the familial connection that she ha[d] been missing for quite some time." She enjoyed playing with I.M.'s daughter and was also attached to her Aunt Angela, I.M.'s mother.

However, Father, through his attorney, alleged that I.M.'s home was not an appropriate placement. Specifically, Father's attorney claimed that I.M.'s boyfriend had moved into the home, had physically abused I.M., and was dealing drugs. Father's attorney represented to the court that Father was aware of these issues because, as an AC Transit bus driver, he frequently drove past I.M.'s home late at night and observed "the activity" there. His attorney asked that there be an investigation of I.M.'s household.

Through his attorney, Father also recommended a different relative (another of his nieces, Victoria, who was also M.H.'s godmother) as a potential placement. Counsel requested that the child welfare worker evaluate Victoria's home as a possible alternative placement before any further hearing be set.

In her report, the child welfare worker noted Father's allegation that there had been a "physical altercation" between I.M. and her boyfriend in I.M.'s home, apparently based on information he had received from "a local drug dealer." The report noted that Father "regrets' choosing [I.M.'s home] as a placement for M.H." based on "things that he has heard from individuals around town." The social worker also reported that Father had appeared unannounced at I.M.'s house and cursed at her. I.M. requested that the social worker not repeat Father's complaints to her because they upset her, and she did not want further disrespectful communications from Father. As I.M. told the social worker, she was "trying to help" Father by raising a daughter for whom he could not safely care.

M.H.'s attorney told the court that the child welfare worker, who was not present at the hearing, had investigated Father's allegations and still believed placement with I.M. was appropriate. Father's attorney requested that the matter be "put over" so the child welfare worker could be questioned about her investigation. The court said it could

address those issues at the .26 hearing, but Father's attorney disputed this. Father's counsel insisted that one of the issues to be determined at the hearing under section 366.3 was whether the "placement of the child is necessary and appropriate," and argued that, while an out-of-home placement might be necessary, this particular placement was "inappropriate." Counsel argued tenaciously that Father would lose the opportunity to address the issue altogether if the court proceeded to a .26 hearing without first affording him a contested hearing under section 366.3, despite the fact that the court reassured her repeatedly that the issues would be addressed at the .26 hearing.

In explaining how the appropriateness of the placement could be raised at a .26 hearing, the juvenile court stated: "The .26 hearing requires the Court to find that there is . . . clear and convincing evidence showing that the child is likely to be adopted within a reasonable time. If that home is not appropriate with respect to adoption, that child cannot be adopted. The issue will be addressed at that time." The court further reassured counsel, "Every issue that needs to be addressed and that needs to be raised with respect to the interest and protection of this child will be addressed on that date." The court set the .26 hearing for October 27, 2009, noting that it would cover "all contested matters in addition to the .26 hearing," including "all of the issues that have been raised today."

At the hearing, M.H.'s counsel suggested that Father file a petition under section 388 to be heard at the time of the .26 hearing. Father's counsel said, "I decline to do so," and she has adhered to the position that she need not do so in her writ petition.

The court directed the Agency "to ensure that this child is safe in the current residence" and ordered the Agency to prepare preliminary adoptability assessments. (§§ 366.21, subd. (i), 366.22, subd. (c).)

The case comes before us on a petition for extraordinary relief under section 366.26(*l*)(1) and California Rules of Court, rules 5.600 and 8.452.[5] On August 24, 2009, after the writ petition was filed, the juvenile court issued an order

[5] References to rules are to the California Rules of Court.

clarifying that it intended to proceed under both sections 366.3 and 366.26 at the October 27 hearing.

DISCUSSION

I. Father's failure to sign notice of intent to file writ petition

Father's counsel filed a notice of appeal on July 2, 2009. This court issued an order on July 8, 2009, notifying counsel that the appropriate manner of proceeding would be to file a petition for an extraordinary writ to review the order setting the .26 hearing. We deemed the notice of appeal a notice of intent to file a writ petition. However, since Father had not signed the notice, as required by rule 8.450(e)(3), we told counsel that "in the event a petition is filed, trial counsel must include a declaration that satisfies the requirements of [rule 8.450(e)(3)], as interpreted by *Lisa S. v. Superior Court* (1998) 62 Cal.App.4th 604 [(*Lisa S.*)] or this court may dismiss all proceedings."

The petition for extraordinary relief was filed August 13, 2009. We issued an order to show cause on August 14. On August 17, Father's counsel filed a declaration explaining that she believed an appeal was the appropriate vehicle for raising Father's claims of error. Due to this procedural error, Father had not signed the notice of appeal (deemed a notice of intent to file a writ petition). In the time since she received this court's July 8 order, counsel said she had been unable to contact Father because he works at night and "is generally unavailable between regularly scheduled court dates."

We do not consider counsel's explanation to constitute "good cause" for the failure to comply with rule 8.450(e)(3), and we would be justified in dismissing the writ petition on that ground alone. As the court held in *Lisa S.*:

" 'We cannot emphasize strongly enough that the burden is on the *parent* in a juvenile dependency case to pursue his or her appellate rights. It is not the *attorney's* burden. The dependency scheme is designed to aid those parents who seriously want to maintain a healthy parental relationship with their children. It is not too much to ask those parents to make the effort necessary to show genuine interest in their children by conferring with their attorney and making themselves available to sign the necessary documents. More to the point: an attorney representing one of these parents does not have

a duty to chase them down and prompt them into taking the elementary steps necessary to keep their claim of parental rights alive.' [Citation.]" (*Lisa S., supra*, 62 Cal.App.4th at p. 607.)

Despite our belief that the declaration filed by Father's counsel does not constitute "good cause" for failing to comply with rule 8.450(e), we choose to address the issues on their merits, mindful of the clear legislative preference that we do so (§ 366.26, subd. (*l*)(4)(B); rules 8.450(b) and 8.452(i)(1)), and, we conclude, this writ petition could be viewed as a tempest in a teapot—that we could dispose of with the simple observation that the court did not *deny* Father a contested hearing, but rather *granted* him a hearing set for October 27, 2009. Nevertheless, we discuss the scope of a parent's right to participate in post-permanency review hearings under section 366.3, to explain why the juvenile court acted properly in setting both hearings on the same date, and if anything, gave Father more than he was entitled to.

II. The guiding principles

We approach the issue in light of the statutory goals and preferences for dependent children. At the outset of a dependency matter, "preservation of the family [is] the first priority . . . . [To that end, the dependency statutes provide] public and private services to alleviate family crises which threaten the well-being of children, to prevent the breakup of families, and to reunify families when children must be removed for their safety." (*In re Heather B.* (1992) 9 Cal.App.4th 535, 541 (*Heather B.*); see also §§ 202; 361.5, subd. (a).)

However, there is also a "legislative policy determination that reunification services should be 'time-limited' in favor of permanency planning at the earliest appropriate time." (*Heather B., supra*, 9 Cal.App.4th at p. 541.) Reunification services ordinarily are available for a maximum of 12 months for children over three years of age, but may be extended to 18 or even 24 months if the circumstances so warrant. (§361.5, subd. (a)(1)(A), (a)(3), (a)(4).) Once reunification services have been terminated, however, the focus shifts from the protection of parental rights to the needs of the child

for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.)

If reunification services fail, the overriding legislative goal becomes the establishment of "stable, permanent homes" for children whose parents cannot or will not provide a proper home for them. (§ 366.26, subd. (b).) Thus, " 'up until the time the [permanency] hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency.' [Citation.] However, '[o]nce reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.]" (*David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 778 (*David B.*).) While reunification is still a possibility in the post-permanency context, it is presumed that continued care is in the best interests of the child, unless the parents can prove otherwise. (§ 366.3, subds. (e), (f).) The statutory priorities for permanency favor " 'adoption over legal guardianship over long-term foster care.' [Citation.]" (*Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334, 340-341 (*Sheri T.*); see also § 366.26, subd. (b)(1)-(b)(5).)

Section 366.3 provides a semi-annual status review for children who, like M.H., have been placed in long-term foster care or with a relative caretaker. (§ 366.3, subd. (d).) It requires the court or other reviewing body to "determine whether or not reasonable efforts to make and finalize a permanent placement for the child have been made." (*Ibid.*) Subdivision (e) of that section[6] requires inquiry "about the progress being made to provide a permanent home for the child [and to] consider the safety of the child," leading to a number of required determinations, including "[t]he continuing necessity for, and appropriateness of, the placement. . . ." Subdivision (f), the scope of which is here in dispute, provides in part: "Unless their parental rights have been permanently terminated, the parent or parents of the child are entitled to receive notice of, and participate in, those hearings."

[6] References to subdivisions without specification of section are to section 366.3.

Subdivision (f) notwithstanding, in cases involving a permanent plan other than adoption or guardianship, there is a decided legislative preference for moving on to the selection and implementation of a more stable permanent plan in the absence of compelling circumstances. Accordingly, subdivision (h) provides: "At the review held pursuant to subdivision (d) for a child in long-term foster care, the court shall consider all permanency planning options for the child including whether the child should be returned to the home of the parent, placed for adoption, or appointed a legal guardian, or, if *compelling reasons exist* for finding that none of the foregoing options are in the best interest of the child, whether the child should be placed in another planned permanent living arrangement. *The court shall order that a hearing be held pursuant to Section 366.26, unless it determines by clear and convincing evidence that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship*. . . . Only upon that determination may the court order that the child remain in foster care, without holding a hearing pursuant to Section 366.26." (Italics added; see also rule 5.740(b)(8)-(b)(10).) Thus, the statute identifies long-term foster care or "another planned permanent living arrangement" as the least desirable option for placement and permits a court to avoid setting a .26 hearing only if it makes certain findings, none of which applies in this case.

We address the question whether a parent's "right to participate" in periodic reviews under subdivision (f) requires a juvenile court to depart from this legislative mandate based on the parent's request for a contested hearing on the "appropriateness" of the current placement (which otherwise appears likely to become an adoptive placement).

Father asserts that he has an "absolute entitlement" under subdivision (f) "to challenge the recommendations of the child welfare worker, a right to dispute the contents of the report, a right to testify, a right to present evidence, to examine and cross-examine adverse witnesses and, of course, a right to argue [his] case before the court" on any issue upon which the court must make a finding at the status review, as

well as on the issue of visitation. The Agency argues, "While [section 366.3] may provide [Father] with a right to contest the appropriateness of the long-term placement plan as a whole, nothing in that section entitles him to challenge the appropriateness of any specific individual to whom his daughter is placed. The selection of an individual to whom a dependent child is placed under a permanent plan is an administrative decision, which lies within the Agency's discretion."

To the extent the Agency suggests that its exercise of discretion is immune from judicial review, we disagree. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 648-650; *In re Robert A.* (1992) 4 Cal.App.4th at174, 188-190; see also, *In re Miguel E.* (2004) 120 Cal.App.4th 521, 546-548 [removal of children from relative placement reviewed for substantial evidence]; *Department of Social Services v. Superior Court* (1977) 58 Cal.App.4th 721, 739-741 [even after termination of parental rights, court may review department's placement decisions for abuse of discretion].)

Nevertheless, we agree with the Agency that Father did not have a statutory right to a separately-set contested hearing on a date prior to the .26 hearing.

A. Visitation

Although Father's petition alleges that he was denied a contested hearing on visitation, the record in fact shows that no request for a hearing on that issue was made. Perhaps Father has belatedly raised this issue in order to bring his case within the holding of *In re Kelly D.* (2000) 82 Cal.App.4th 433 (*Kelly D.*), which held that a parent has a right to a contested hearing if the social services department proposes a reduction in the frequency of visitation.

This case is clearly distinguishable from *Kelly D.*, in that neither Father nor his counsel raised any question about visitation during the hearing under section 366.3. We cannot find that the juvenile court erred in failing to grant a hearing on an issue as to which a hearing was never requested. The Agency had proposed to Father in June that visitation be reduced to once a month, and Father had expressed no opposition. The case plan continued to reflect weekly visitation, however, and the court made no order

reducing Father's visitation. Any right Father may have had to contest the frequency or conditions of visitation has been forfeited by failure to raise it below. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412.)

B. Continuing necessity for, and appropriateness of, minor's placement

1. Father did not have an "absolute entitlement" to a separately-calendared contested hearing under subdivision (f).

Father appears to argue, based on the reasoning of *Kelly D.*, that he was entitled to delay the setting of a .26 hearing in order to have a separate contested hearing on "[t]he continuing . . . appropriateness of [M.H.'s] placement." (§ 366.3, subd. (e)(1).) He does not dispute the necessity of the out-of-home placement,[7] but claims that subdivision (f) gave him an absolute right to a contested hearing on the appropriateness of the placement with I.M. because that is one of the issues that must be addressed at a hearing under section 366.3.

Though subdivision (f) gives no explanation of the scope of a parent's right to "participate" in post-permanency status review hearings, the context gives us some guidance.[8] Immediately after granting parents a right to participate, subdivision (f) continues: "It shall be presumed that continued care is in the best interests of the child, *unless the parent or parents prove, by a preponderance of the evidence, that further*

[7] Continuing "necessity" for the placement might otherwise be an issue on which parent participation would be authorized, since the inquiry would focus primarily on changes in the parent's ability to provide a safe home for possible return of the child under subdivision (h). It was not an issue in this case, however, as Father's attorney conceded that out-of-home placement continued to be "necessary."

[8] Section 366.3 also governs periodic review for children who have been permanently planned for adoption or guardianship but whose placements have not yet been finalized. (§ 366.3, subd. (a).) This would include cases in which parental rights have been terminated. Therefore, subdivision (f) appears to have been intended first and foremost to distinguish between parents whose rights have and have not been terminated, allowing those in the latter category to participate in post-permanency review, as appropriate to the stage of the proceedings and the legislative goals of the dependency scheme.

efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent or parents up to a period of six months, and family maintenance services, as needed for an additional six months in order to return the child to a safe home environment." (Italics added.) Thus, the opportunity to "participate" appears to be intended primarily to give the parent a last chance to persuade the court that reunification is still possible.

We take this factor into account in considering the scope of the right of participation. We also consider the interest of the juvenile court in exercising broad control over dependency proceedings, the interest of the child and the Agency in obtaining a reasonably prompt resolution and a safe and stable permanent home for the child, and the diminishing rights of parents as their children move through the dependency process. In light of these factors, we do not read the statute as invariably guaranteeing to a parent an unfettered right to a contested hearing on every issue that the court must address under section 366.3.

The cases upon which Father relies establish a parent's right to challenge departmental proposals and proposed court modifications, as well as to contest issues that directly affect the parents' own interests in reunifying with their children. We are not persuaded that the right of participation must be extended further.

In *Kelly D.*, a father who had previously visited weekly with his three children in long-term foster care with "generally positive" results was confronted at a status review hearing with a request by the human services department (HSD) to reduce the frequency of visitation, even though HSD had not specified in its status review report that it sought such a reduction. (*Kelly D.*, 82 Cal.App.4th at pp. 435-436.) The father's counsel asked for a contested hearing on the issue, also claiming lack of notice of the proposed reduction. (*Id.* at p. 436.) The juvenile court ruled that the father had "no right to a contested hearing" on visitation, and that frequency of visitation was "in the discretion of" HSD. (*Ibid.*) It then ordered a reduction of visits to once per month and scheduled a future status review hearing. (*Ibid.*)

Relying both on section 366.3 itself and procedural due process, the father argued on appeal that he was entitled to notice and a contested hearing on visitation. (*Kelly D.*, *supra*, 82 Cal.App.4th at pp. 436-437.) HSD argued that, because visitation is not one of the issues which must be addressed under subdivision (e), and because the issue of visitation pertains more to the minor's interests than to the parent's, the father was not entitled to a contested hearing on that issue. (*Id.* at p. 437.) The Court of Appeal first held that visitation involves the rights of both minors and parents.[9] (*Id.* at p. 438.) Reunification remained a possibility in *Kelly D.* because the children were in long-term foster care (§ 366.3, subds. (f), (h)). (*Kelly D., supra,* at pp. 435, 436.)

Then, and without resolving the due process issue, the Court of Appeal held that the father was entitled to a contested hearing based on the express rights of notice and participation under what is now subdivision (f).[10] (*Kelly D., supra*, 82 Cal.App.4th at pp. 437-438, fn. 3.) It further held that the right to "participate" "connotes involvement as a party to the proceeding, one essential aspect of which is the reasonable expectation that parents could challenge departmental *proposals* and proposed court *modifications*." (*Id*. at p. 438, italics added.) The right to "participate" includes "the right to testify and otherwise submit evidence, cross-examine adverse witnesses, and argue his case."[11] (*Id.* at p. 440.)

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[9] Indeed, visitation is directly related to a parent's attempt to reunify his or her family (e.g., §§ 362.1, subd. (a)(1)(A), 366.21, subd. (g)(1)(A), 366.22, subd. (b)(1)). Even in a case that has been scheduled for a .26 hearing, visitation may make a difference in the decision whether to terminate parental rights. (§ 366.26, subd. (c)(1)(A).) Thus, the parent continues to have a personal stake in the issue of visitation even late in the dependency proceedings if he or she wants to maintain parental rights over the child. (See *In re Josiah S.* (2002) 102 Cal.App.4th 403, 420 (*Josiah S.*).)

[10] The provisions of subdivision (f) were then included in subdivision (e). They were moved to a separate subdivision, with modification not here relevant, effective January 1, 2009. (Stats. 2008, ch. 482 § 7, p. 520.)

[11] Under its prior decision in *Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, the same court held that entitlement to a contested hearing at an 18-month review during the reunification period depends on " 'a balancing of the [parent's] rights and interests against the Juvenile Court's [duty] to conduct a prompt and efficient status

Josiah S., supra, 102 Cal.App.4th 403, upon which Father also relies, involved a right to a contested hearing where the parent sought to reunify with her child. Josiah was born with significant health problems and failed to thrive in the first months of his life. He was declared a dependent of the court based on the mother's refusal to allow home health care nurses into her home to check on him, her "bizarre" behavior when he was hospitalized in infancy, and her failure to obtain medical treatment for him. (*Id*. at p. 407.) A permanent plan was later established for long-term placement in a medical foster home. (*Id*. at p. 409.)

At a post-permanency review hearing under section 366.3, the mother sought a contested hearing, evidently to show that her son's failure to thrive was the result of organic causes, not her deficient care. (*Josiah S., supra,* 102 Cal.App.4th at p. 414.) Though she made no offer of proof, it appears that she intended to contest the court's prior findings and to establish that Josiah's "best interests would be served by his return to her custody." (*Ibid*.; see also *id.* at p. 417.) The court denied her request for an evidentiary hearing because there was no proposed change in Josiah's placement or permanent plan in that he was to remain in long-term foster care. (*Id.* at p. 413.) The Court of Appeal reversed, and held that the mother nevertheless was entitled to an evidentiary hearing under section 366.3 and that no offer of proof was necessary. (*Josiah S., supra,* 102 Cal.App.4th at p. 417.)

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review hearing. . . .' " (*Kelly D., supra,* 82 Cal.App.4th at p. 437.) Nevertheless, the court concluded that by providing for an express right of participation in subdivision (f), "the Legislature has decided that accommodating the wishes of, and, indeed, rights of parents to attempt to reestablish the parents' relationship with a child is a vital objective" of the dependency system. (*Id*. at p. 439.) It distinguished *Ingrid E.* on the basis that the 18-month review statute (§ 366.22) made no express provision for parent participation. (*Kelly D., supra,* 82 Cal.App.4th at p. 439.) To the extent this reasoning suggests that a parent has a greater right of participation at a post-permanency review than at a review during the reunification period, we cannot agree.

Both *Kelly D.* and *Josiah S.* involved a parent's attempt to establish that family reunification remained possible,[12] a factor we think key to understanding the scope of allowable parent participation under section 366.3. Courts should be cautious in extending the right of participation too far beyond that context. *Kelly D.* and *Josiah S.* do not stand for the proposition that parents are entitled to contested hearings on every issue that the court must determine under subdivision (e), as Father suggests.

Subdivision (e) lists numerous determinations that the court must make at a status review hearing, including: "(1) The continuing necessity for, and appropriateness of, the placement. [¶] . . . [¶] (3) The continuing appropriateness and extent of compliance with the permanent plan for the child, including . . . efforts to identify a prospective adoptive parent or legal guardian. . . . [¶] (4) The extent of the agency's compliance with the child welfare services case plan in making reasonable efforts either *to return the child to the safe home of the parent* or to complete whatever steps are necessary to finalize the permanent placement of the child. *If the reviewing body determines that a second period of reunification services is in the child's best interests, and that there is a significant likelihood of the child's return to a safe home due to changed circumstances of the parent, pursuant to subdivision (f), the specific reunification services required to effect the child's return to a safe home shall be described.* . . . [¶] (5) Whether there should be any limitation on the right of the parent or guardian to make educational decisions for the child. . . . [¶] . . . [¶] [and] (7) The extent of progress the parents or legal guardians have made toward alleviating or mitigating the causes necessitating placement in foster care. . . ." (Italics added.) Finally, as quoted above, subdivision (h), requires the court to

[12] Even on issues involving potential reunification, parents do not have a right to a contested hearing to rehash old arguments. The statute allows the court to grant additional reunification services if, "due to changed circumstances of the parent," "a second period of reunification services is in the child's best interests," "there is a significant likelihood of the child's return to a safe [parental] home," and "further efforts at reunification are the best alternative for the child." (§ 366.3, subds. (e)(4), (f).) The parent bears the burden of proof. (§ 366.3, subd. (f).)

"consider all permanency planning options for the child including *whether the child should be returned to the home of the parent* . . . ." (Italics added.)

As demonstrated by the italicized portions quoted above, several of the prescribed determinations involve issues directly implicating the parents' interests, especially their interest in reestablishing a safe home for their child. On such issues, it may well be that the statute allows parents a contested hearing upon request.

This case stands on a different footing, however, because the issue Father sought to contest had nothing to do with an effort by him to be reunited with his daughter, nor any other of his own interests among the issues listed in subdivision (e). To read the statute as allowing a parent to demand a contested hearing at this late stage in the proceedings for purposes unrelated to family reunification is of dubious merit. When the court assesses the "continuing . . . appropriateness" of a placement, it does so for the benefit of the child, not the parent. Thus, whether *Father* has a right to a contested hearing on the "appropriateness" of the placement is questionable on principles akin to standing.

This case is also different from *Kelly D.* and *Josiah S.* because a potential adoptive home had been identified for M.H., and both the Agency and M.H.'s attorney had requested the setting of a .26 hearing. A .26 hearing had not been set in *Kelly D.* and *Josiah S,*[13] which suggests that the potential for a more permanent placement had not yet materialized. M.H. has progressed further through the dependency process in that a prospective adoptive home has been identified.

To grant a parent an absolute right to a contested hearing at this juncture—at least if it is set separately from the .26 hearing—would cause exactly the delays in implementing a permanent plan that subdivision (h) was intended to avoid. The competing demand of subdivision (h) to set a .26 hearing must therefore be considered in delimiting the parents' rights under subdivision (f).

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[13] *Kelly D.*, *supra*, 82 Cal.App.4th at p. 439, distinguished *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138 (*Maricela C.*) on the basis that a .26 hearing had already been set.

In that sense this case is closer procedurally to *Maricela C.*, where, in setting a .26 hearing at a post-permanency review, the juvenile court denied the mother a contested hearing based on an inadequate offer of proof. (66 Cal.App.4th at p. 1147.) There, the mother wanted to dispute the social worker's evaluation of the quality of her visits with her children, claiming the children should be returned to her care under what is now subdivision (h).[14] (*Id.* at p. 1142.) *Maricela C.* held a juvenile court is "required to accept an offer of proof from the parent seeking return of his or her child. . . . [and] to consider whether the parent's representations are sufficient to warrant a hearing involving full confrontation and cross-examination." (*Id.* at p. 1147.)

In *Maricela C.*, the only offer of proof was that the mother would testify about transportation difficulties she had encountered in maintaining frequent visitation. (66 Cal.App.4th at p. 1148.) The Court of Appeal concluded that such evidence "may have been relevant at the hearings that took place years ago, before reunification had been terminated. However, after reunification was terminated . . . , the focus of the dependency proceedings shifted from maintaining biological ties to providing stability and permanence for the children. [Citation.]" (*Ibid.*) Due process did not require that a parent be provided with an absolute right to a contested hearing at that stage of the proceedings. (*Id.* at pp. 1146-1147.)**[15]** Although *Maricela C.* did not discuss the precise

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[14] At the time *Maricela C.* was decided the corollary provisions were contained in subdivision (f). (See *Maricela C., supra,* 66 Cal.App.4th at p. 1143.) Amendments in 1998 and 2008 resulted in renumbering of the subdivisions. (Stats. 1998, ch. 1056, § 18.7, p. 6947; Stats. 2008, ch. 482, § 7, p. 520.)

[15] It is true that a parent has a right, even without an offer of proof, to a contested hearing in the reunification stage. *In re James Q.* (2000) 81 Cal.App.4th 255, 266 (*James Q.*) held that due process at that stage requires "a hearing at which the parent has the right to make his or her case . . . *concerning the parent's progress in attempting to effectuate reunification with his or her children*." (*Id.* at p. 265, italics added.) *James Q.* recognized the flexible demands of due process and approved of the statement that "ordinarily a parent must have the right to present evidence '*at each hearing until after the permanency plan*.' [Citations.]" (*Ibid.*, italics added; see also *David B., supra,* 140 Cal.App.4th at p. 780 [while holding parent is entitled at 18-month review to contested hearing without an offer of proof, it need not "address whether the above

issue of statutory construction that is before us,[16] it illustrates the kind of dilatory—and perhaps frivolous—litigation that may ensue if the right of parent participation is construed too broadly.

In the present case, Father's desire to nominate yet a different relative to take custody of M.H. after a potential adoptive home had been identified—thereby further disrupting his daughter's life—would appear to be beyond the scope of the parent participation envisioned by the Legislature under subdivision (f). Other participants in the review process are in a better position to speak for the child regarding the appropriateness of that placement.[17] We believe the juvenile court in this instance would have been justified in predicating the availability of a contested hearing on an offer of proof. Had that requirement been imposed, Father's observations while driving his bus past I.M.'s house late at night would not have qualified.[18] To hold a parent has an absolute right to a contested hearing on this issue would invite disgruntled parents to transform status review hearings "into subjective attacks on all [placements] in efforts to avoid [the setting of a .26 hearing and the] termination of parental rights . . . ." (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844 (*Scott M.*).) Nevertheless, whether it was

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analysis as applied to review hearings during the reunification period pertains to other provisions of the dependency scheme"].) Thus, *James Q.* specifically distinguished cases, such as *Maricela C.*, *supra*, 66 Cal.App.4th 1138, because "those cases involved hearings following the expiration of the reunification period." (*James Q., supra,* 81 Cal.App.4th at p. 267.) Given that M.H.'s case is in the post-reunification phase, *James Q.* and *David B.* are not controlling.

[16] The mother did not claim a statutory right to a contested hearing under the then extant provision of section 366.3 here under review.

[17] These would include the representatives of the Agency having custody of the child (§§ 361.2, subd. (e); 280 ["shall . . . represent the interests" of the minor in court]), any court-appointed special advocate (§ 102, subd. (c)(2)), and the child's attorney (§ 317, subd. (e)), all of whom are charged with representing the child's interests.

[18] An offer of proof must consist of material that is admissible, and it must be specific in indicating the name of the witness and the purpose and content of the testimony to be elicited. (*In re Mark C.* (1992) 7 Cal.App.4th 433, 445.)

required to do so or not, the fact is the court granted Father a contested hearing, which makes this writ petition all but frivolous.

2. Father was not denied a contested hearing under section 366.3, and the court did not err in setting that hearing on the same date as the .26 hearing.

Both *Kelly D.* and *Josiah S.* involved an outright refusal of the court to hold a hearing on the merits of the parent's proposed issues. The juvenile court in this case, however, did not deny Father an evidentiary hearing. When asked point blank if it were denying a contested hearing, the court responded, "No. The issue can be addressed and will be addressed at the hearing date set for the .26 matter." The court repeatedly assured Father's counsel that the merits would be addressed on October 27, saying it would address "all contested matters in addition to the .26 hearing", including a "contested hearing . . . as to the matters addressed today."

We construe the court's remarks as *granting* Father's request for a contested hearing, regardless of whether he was statutorily entitled to it,[19] but ruling that he could not derail the setting of the .26 hearing for that purpose. Were there any doubt on this point, it was clarified by the juvenile court's order of August 24, 2009, which specifically stated that the hearing on October 27 would be conducted under both sections 366.3 and 366.26, and which the court ordered Father's counsel to forward to us.

We see no reason why an inquiry into the appropriateness of the placement cannot be conducted on the same date as the .26 hearing. Had Father filed a section 388 petition, as is commonly done in such circumstances (see *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Marilyn H.*, *supra*, 5 Cal. 4th at p. 309), the hearing on that petition could have

[19] Since Father was not denied a contested hearing, we need not decide whether he had a due process right to such a hearing. We note, however, that in similar circumstances, the Fourth District held a mother was not entitled to a contested hearing at a section 366.3 review where the only issue she wished to contest was a recommended change in the permanent plan from long-term foster care to adoption by the same relative caretaker, claiming a .26 hearing was not in the minor's best interests. (*Sheri T., supra*, 166 Cal.App.4th at pp. 338-341.) The mother did not claim a right to a contested hearing under subdivision (f), but relied on a due process theory. The court rejected that argument because she had made an insufficient offer of proof. (*Id.* at p. 341.)

been combined with a .26 hearing, so long as the section 388 petition were addressed first. (See *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416, fn. 14; see also, Seiser and Kumli, Cal. Juvenile Courts Practice and Procedure (2009) § 2.140[3], at pp. 2-354-2-355.) This rule appears to apply, however, only if the parent seeks reunification, rather than when he or she seeks placement of the child with a different relative or foster caregiver. (*Ibid.*) We see no reason why the same procedure cannot be followed in the present case. Thus, we perceive no prejudice to Father as a result of the court's ruling. (*Sheri T., supra,* 166 Cal.App.4th at p. 341.)

3. Determination of appropriateness of the placement at a .26 hearing.

As noted in the statement of facts, the court at one point indicated it could address Father's concerns in considering whether M.H. was "likely [to] be adopted" at the hearing under section 366.26, subdivision (c)(1). Father's counsel insisted the issues of domestic violence and drug dealing were part of the "appropriateness" inquiry under section 366.3 and could not be raised at a .26 hearing.

As a general matter, the .26 hearing does not provide a forum for parents to contest the suitability of the adoptive parents. (*Scott M., supra,* 13 Cal.App.4th at p. 844.) "Rather, what is required is clear and convincing evidence of the likelihood that the children will be adopted within a reasonable time either by the prospective adoptive family or some other family." (*Ibid.*) The inquiry at that phase should focus on the adoptability of the child, including his or her age, physical condition, emotional state, and other factors that would make it difficult for him or her to be adopted. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) "If inquiry into the suitability of prospective adoptive parents were permitted in section 366.26 hearings, we envision that many hearings would degenerate into subjective attacks on all prospective adoptive families in efforts to avoid termination of parental rights. Such a result is not envisioned by the statutory scheme. Rather, the question of a family's suitability to adopt is an issue which is reserved for the subsequent adoption proceeding." (*Scott M., supra,* 13 Cal.App.4th at p. 844.)

However, this rule does not invariably preclude parental challenges to the likelihood of adoption at the .26 hearing based on factors relating to the prospective adoptive parents, rather than solely on child-specific factors. "[W]here the child is deemed adoptable based solely on the fact that a particular family is willing to adopt him or her, the trial court must determine whether there is a legal impediment to adoption." (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061; see also, *In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650.) In fact, Division Three of this district held that the parents were entitled as a matter of due process to examine the adoptions specialist and the prospective adoptive parents at a .26 hearing, where their purpose was to controvert the agency's evidence of adoptability of a hard-to-place sibling group. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 733-734.) The court used a balancing approach to determine whether due process required this procedure, taking into account the prospect that, if the adoption by the current foster parents fell through, the children could end up being "legal orphans." (*Id*. at pp. 730, 734.) We presume the court below had this exception in mind in making the comments it did.

The fact that M.H. is nearly nine years old would tend to make adoption more difficult (see § 366.26, subd. (c)(3)), and given her history in foster care, the finding of adoptability may be closely tied to the identification of a prospective adoptive parent. In these circumstances, the court would not err in inquiring into the suitability of the prospective adoptive parent's home in determining whether "it is likely the child will be adopted."[20] (§ 366.26, subd. (c)(1).)

Nevertheless, having proceeded in the manner in which it did, the juvenile court should consider the contested issues under section 366.3 separately from the issues under section 366.26. (See *In re Jeremy W.*, *supra*, 3 Cal.App.4th at p. 1416, fn. 14.)

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[20] As for the concern expressed by Father's counsel that she will not receive the Agency's assessments under sections 366.21, subdivision (i), and 366.22, subdivision (c) in sufficient time to prepare for the October 27 hearing, we trust that the Agency will comply with applicable time requirements in preparing those assessments and providing required copies. (Rule 5.725(c).)

DIPOSITION

The petition is denied. Our decision is final as to this court immediately.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.